UPREME COURT. U. S.

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IN THE

Supreme Court of the United States

October Term, 1968

No. 50

HANOVER INSURANCE COMPANY OF NEW YORK,
Appellant,

v.

CARL S. VICTOR,
Appellee.

Appeal from the Court of Appeals of the State of New York

MOTION TO DISMISS APPEAL OR, IN THE ALTERNATIVE, TO AFFIRM, WITH BRIEF IN SUPPORT THEREOF

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IN THE

Supreme Court of the United States

October Term, 1967

No. 1273

HANOVER INSURANCE COMPANY OF NEW YORK,
Appellant,

v.

CARL S. VICTOR,
Appellee.

Appeal from the Court of Appeals of the State of New York

NOTICE OF MOTION TO DISMISS APPEAL OR, IN THE ALTERNATIVE, TO AFFIRM

SIRS:

PLEASE TAKE NOTICE that CARL S. VICTOR, appellee herein, respectfully moves this Court under Rule 16, subdivisions 1(b), and 1(d) of the Revised Rules of the Supreme Court of the United States (a) to dismiss the instant appeal or (b), in the alternative, to affirm, on the ground that said appeal does not present any substantial Federal question and on the further ground that neither appellant Hanover

Insurance Company of New York nor its insured Lyon Associates, Inc., has been deprived of any constitutional right by the decisions of the New York Court of Appeals in *Seider* v. *Roth*, 17 N.Y. 2d 111, *Simpson* v. *Loehmann*, 21 N.Y. 2d 305, reargument denied, and *Victor* v. *Lyon Associates, Inc.*, 21 N.Y. 2d 305, and on the further ground that it is manifest without need for further argument that the constitutional questions raised by appellant Hanover Insurance Company of New York are unsubstantial.

Dated: New York, N.Y.
June 14, 1968

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IN THE

Supreme Court of the United States

October Term, 1967

No. 1273

HANOVER INSURANCE COMPANY OF NEW YORK,
Appellant,

v.

CARL S. VICTOR,
Appellee.

Appeal from the Court of Appeals of the State of New York

BRIEF OF APPELLEE IN SUPPORT OF MOTION

(A) The Attachment Herein is Not Violative of Any Constitutional Right of Appellant-Insurer.

Appellant does not, and indeed could not, dispute the validity of the New York Court of Appeals' premise in *Seider* v. *Roth*, 17 N.Y. 2d 111, that as a liability insurer, "it has agreed to defend in any place where jurisdiction is obtained against its insured" (17 N.Y. 2d at 114). Hav-

ing agreed with its insured to defend any action embraced in the policy, wherever suit is instituted, appellant is hardly in a position to complain of having to defend an action commenced by a New York resident in the State of New York, the very State of appellant's incorporation. The Court of Appeals, in "requir(ing) the insurer to defend here (in New York)" (*Seider* v. *Roth*, 17 N.Y. 2d at 114), has imposed no burden on appellant in excess of that assumed at the very inception of its policy, much less a burden amounting to undue interference with its interstate business as suggested by appellant on page 11 of its jurisdictional statement. The defense of lawsuits wherever commenced is appellant's very business.

True, the insured was not personally served with process in New York, but appellant makes no claim—and never has—of any conceivable genuine interest of its own respecting the place in which jurisdiction is ultimately acquired (see Ausubel, *Seider Re-examined*, New York Law Journal, April 24, 1968, p. 1 and April 25, 1968, p. 1). As the author states (April 25, 1968 at p. 4): "* * * (I)t is highly doubtful that an insurance carrier in a mobile age such as this might reasonably predict where it might be required to defend a suit arising out of an accident in which its insured was involved, or that premiums are based upon such a consideration."

Appellant's principal objection to the attachment of its policy is its claim on page 7 of the jurisdictional statement that it will be required to pay out the proceeds of the policy despite the fact that its non-resident insured "rather than submit itself to unlimited personal liability in this foreign forum, has refused to allow (appellant) to appear and

contest on the merits." In its supplemental brief, appellant seems to recognize that, under the decision of the Court of Appeals on reargument of *Simpson* v. *Loehmann*, the possibility that the interposition of a defense on the merits of appellee's claim may subject the insured to unlimited liability in this lawsuit has now been eliminated.

However, let us assume *arguendo* that despite the adoption by New York of a rule permitting a limited appearance, the insured, for reasons of its own, persisted in refusing to permit appellant to defend appellee's action. Appellant, we presume, would likewise persist in claiming that under *Seider* it would have to pay appellee the proceeds of its policy on such a forced default, in violation of its policy right to defend on the merits any case wherein it may ultimately be required to pay money.

There is no validity to the contention that under the law of New York, once a liability policy is attached, the insurer must pay out its proceeds whether or not it is given an opportunity to defend the underlying claim. We know, from the express language of the Court of Appeals, that an insurer may, after attachment, withdraw from the lawsuit entirely once the insured prevents or obstructs the defense of the lawsuit. As the Court wrote (*Simpson* v. *Loehmann*, 21 N.Y. 2d 305, 309 at footnote 2): "* * * If the insured does refuse to cooperate, the insurer's recourse is clear: he may withdraw and assert such lack of co-operation as a defense in any action brought against him under section 167 of the Insurance Law." *Podolsky* v. *Devinney*, SDNY, 38 U. S. Law Week 2881, quoted at pages 21a-42a of appellant's jurisdictional statement, also acknowledges this

(see pp. 32a-33a, footnote 17). *Podolsky* was decided prior to the decision of the New York Court of Appeals on reargument of *Simpson* and its opinion as to the constitutionality of *Seider* was rendered academic by the subsequent action of the New York court. Surely, however, *Podolsky's* acknowledgment that the insurer may withdraw where the insured fails to cooperate remains totally unaffected by the opinion in *Simpson* on reargument.

Probably appellant would be permitted by the New York courts to interpose a defense on the merits despite any refusal by the insured so to allow. Since, under the *Simpson* decision on reargument, appellee can never recover more than the proceeds of the policy, the insurer is really the only party in interest. But, even assuming that an insurer is powerless to interpose a limited appearance in defense of the action where the insured refuses to permit it, there is not the slightest hint in *Seider* or *Simpson* that New York would compel an insurer to pay out its policy proceeds on such a forced default. As aforesaid, all indication from the Court is precisely to the contrary.

In view of the foregoing, it is also very plain that New York's attachment procedure does not at all violate the so-called "No Action" clause in appellant's policy. That clause reads as follows:

> "No action shall lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment

> against the insured after actual trial or by written agreement of the insured, the claimant and the company."

As stated earlier, the New York decisions do not even intimate that appellant would ever be required to pay anything in the absence of full co-operation by the insured and an equally full opportunity for appellant to defend the lawsuit commenced by appellee. As the Court wrote in *Simpson* (21 N.Y. 2d at 311):

> "The argument that our decision sanctions a 'direct action' against the insurer is sufficiently answered by what we wrote in *Seider* v. *Roth* (17 N.Y. 2d, at p. 114):
>
> 'It is said that by affirmance here we would be setting up a "direct action" against the insurer. That is true to the extent only that affirmance will put jurisdiction in New York State and require the insurer to defend here, not because a debt owing by it to the defendant has been attached but because by its policy it has agreed to defend in any place where jurisdiction is obtained against its insured.' "

Appellant simply fails to appreciate that the New York attachment procedure does not even purport to eliminate a single one of its contract rights.

Patently without merit, as well, is appellant's further claim that the attachment of its policy actually prevents it from defending appellee's lawsuit. Obviously, the duty to defend has not been seized by the attachment in the sense that it can no longer be carried out. *Seider* specifically announces that an insurer is "requir(ed)" to defend in New York a lawsuit commenced through the attachment procedure (17 N.Y. 2d at 114).

Appellant further complains that the attachment of its policy prevents it from exercising its rights and fulfilling its obligations to the same insured under a different policy which does not cover the instant collision. Under *Seider* and *Simpson,* the attached obligations are of course only those which arose when the instant collision occurred, as those obligations alone may ripen into a duty of payment of appellee's claim.

Appellant advances the further argument that the attachment also prevents it from exercising its duties respecting one Bishop, whose motorcycle was driven by appellee at the time of the collision. The attachment, of course, accomplishes no such thing. Clearly, under the New York cases now under appellant's attack, each separate claim against its insured which may result either from the same occurrence or from other covered accidents gives rise to a separate and distinct obligation of defense and possible payment.

(B) The Attachment Herein is Not Violative of Any Constitutional Right of the Insured.

Harris v. *Balk,* 198 U. S. 215, squarely holds that a debt may be validly attached in any State where the debtor is amenable to personal service of process. Here, the debtor (appellant Hanover Insurance Company of New York) is a New York corporation which was served with attachment process in that State. *Pennington* v. *Fourth National Bank,* 243 U. S. 269 reaffirms *Harris,* as follows:

> "* * * (G)arnishment or foreign attachment is a proceeding *quasi in rem.* * * * The thing belonging to

> the absent defendant is seized and applied to the satisfaction of his obligation. The Federal Constitution presents no obstacle to the full exercise of this power.
>
> * * *
>
> The power of the State to proceed against the property of an absent defendant is the same whether the obligation sought to be enforced is an admitted indebtedness or a contested claim. It is the same whether the claim is liquidated or is unliquidated; like a claim for damages in contract or in tort. It is likewise immaterial that the claim is at the commencement of the suit inchoate, to be perfected only by time or the action of the court. The only essentials to the exercise of the State's power are presence of the rēs within its borders, its seizure at the commencement of procedings, and the opportunity of the owner to be heard" (243 U. S. at 271-272).

It is also the law that the attaching State determines the constituents of an attachable *res* (*Huron Corp.* v. *Lincoln Co.*, 312 U. S. 183; *United States* v. *Miller*, 229 F.2d 839).

Respecting the attachment of liability insurance policies specifically, the New York Court of Appeals in deciding the motion for reargument of *Simpson*, made it crystal clear that a plaintiff's judgment cannot exceed the face value of the policy, even if the insurer undertakes a full defense on the merits. The action remains *in rem* in character. In this connection, appellant is plainly in error when it states, on page 2 of its supplemental brief, that under *Seider* the judgment can exceed policy limits but that recovery thereunder in New York, is limited to the policy proceeds. Appellant's distinction between the terms "judgment" and "recovery", where no such result was ever intended by the Court of Appeals is merely appellant's

way of attempting to preserve its initial argument, advanced before the *Simpson* reargument, that the attachment would, after an appearance, affect the insured *in personam*. On reargument, that issue was laid to rest in the insured's favor, and appellant is obviously well aware of it.

Thus it is that an insured can have no vested interest in resisting an attempt by its insurer to defend a lawsuit embraced within the terms of the insurance policy. Accordingly, the insurer would have every right to expect the insured's full cooperation in the defense of the lawsuit and the insured could hardly claim, under such circumstances, that compulsion to cooperate under penalty of forfeiture of policy rights is somehow constitutionally unfair. Surely, New York's interest in demanding cooperation respecting a lawsuit commenced by a resident, in which a New York insurer is involved, is—at very least—equal to the interest of a non-resident insured to control the defense of a claim which is covered in full by insurance (*Pennoyer* v. *Neff*, 95 U. S. 714; *Simpson* v. *Loehmann*, 21 N.Y. 2d at 311).

Appellant further claims that whether or not the judgment in the instant action may exceed the proceeds of the policy, at very least that judgment would be *res judicata* on the issue of negligence in any subsequent *in personam* action appellee may institute to recover the difference between his actual damages and the face amount of the policy.

It may be that the New York judgment should not, in all fairness, preclude the insured from relitigating the liability issues, inasmuch as it was compelled to appear in New York in order to preserve its policy rights. On the other hand, it may be that having had a full opportunity to litigate the liability issues, due process does not demand that the insured be given a chance to try out these issues anew, no matter the basis upon which jurisdiction was acquired in the initial suit. The resolution of such an issue, however, must of course await the institution of a second action and the assertion therein of a claim that *res judicata* applies. Surely, New York has not yet reached the question, much less has it purported to resolve it. Appellant's anticipation—for argument purposes strictly—of an unfavorable ruling in a subsequent lawsuit in the insured's home state of Maryland is rather a slim basis for declaring the actual limited ruling in *Seider* v. *Roth* constitutionally unsound.

Conclusion

The Court should dismiss this appeal, or, in the alternative, affirm.

Respectfully submitted,

HARRIET E. GAIR
Counsel for Appellee